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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 1033

ROBERT A. HEINZE, WARDEN, California State Penitentiary,

Petitioner,

v.

WILLIAM CUNNINGHAM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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printed in CALIFORNIA OFFICE OF STATE PRINTING

TOPICAL INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
History of Prior Proceedings	4
Facts As Disclosed by State Court Record	5
The Facts Relative to the Alleged Search and Seizure	6
REASONS FOR GRANTING CERTIORARI	12
I The Decision of the Circuit Court Is Not in Accord With *Townsend* v. *Sain*, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745	12
II Where a State Trial Court Affords a Respondent a Full and Fair Opportunity to Secure an Adjudication of All Claimed Deprivations of His Constitutional Rights and He Fails to Fully Utilize This Procedure Is He Entitled to a Plenary Hearing in a Federal District Court on These Same Points?	16
CONCLUSION	20

TABLE OF AUTHORITIES CITED

CASES

	Page
Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668	18
Burge v. United States, 9 Cir. 342 F. 2d 408	18
Cunningham v. California, 368 U.S. 933, 7 L. Ed. 2d 195, 82 S. Ct. 370	4
Drummond v. United States, 8 Cir. 350 F. 2d 983	18
Fay v. Noia, 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822	15
In re Sterling, 63 A.C. 509, ____ Cal. Rptr. ____	18
Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731	14, 20
Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684	5, 13, 14, 15
Maxwell v. Stephens, 8 Cir. 348 F. 2d 325	18
Nelson v. California, 346 F. 2d 73	17
People v. Cunningham, 188 Cal. App. 2d 606, 10 Cal. Rptr. 604	4, 9, 13
People v. Gorg, 45 Cal. 2d 776, 291 P. 2d 469	9, 17
People v. Guyette, 231 Cal. App. 2d 460, 41 Cal. Rptr. 875	17
People v. Kinard, 210 Cal. App. 2d 85, 26 Cal. Rptr. 377	17
People v. Nelson, 218 Cal. App. 2d 359, 32 Cal. Rptr. 675	18
People v. Ortiz, 210 Cal. App. 2d 489, 26 Cal. Rptr. 677	17
People v. Smith, et al., Crim. 8547, 63 A. C.	17
People v. Smith, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866	18
People v. Rogers, 207 Cal. App. 2d 261, 24 Cal. Rptr. 341	17
Rees v. Peyton, 4 Cir. 341 F. 2d 859	18
Roberts v. United States, 8 Cir. 332 F. 2d 892	18
Teasley v. United States, 9 Cir. 292 F. 2d 460	11, 18
Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745	12, 13
United States v. Eldridge, 4 Cir. 302 F. 2d 463	18

CODES

California Health and Safety Code Section 11500	43
United States Code, Section 1254(1)	2

CONSTITUTIONS

United States Constitution	
Fourth Amendment	43
Fourteenth Amendment, Section 1	44

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Warden of the California State Prison at Folsom and the People of the State of California, the real party in interest,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on October 18, 1965, rehearing denied November 24, 1965.

[1] Respondent was paroled from the state prison on August 10, 1965, to a parole program within the State of California.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix A hereto, is reported in 352F. 2d 1. The opinion of the United States District Court, Northern District of California, Northern Division, is printed in Appendix B hereto and was not reported. The opinion of the District Court of Appeal of the State of California, in and for the Second Appellate District, is reported at 188 Cal. App. 2d 606, 10 Cal. Rptr. 604.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1) since a right has been especially set up and claimed under the Constitution of the United States.

STATUTES INVOLVED

The constitutional provisions involved are the Fourth Amendment and Fourteenth Amendment Sec. 1 thereof to the United States Constitution, which are set forth in Appendix C hereto.

QUESTIONS PRESENTED

1. Where a determination of a search and seizure question is made after full hearing on conflicting facts by a state court must a federal district court hold a plenary hearing to redetermine such facts based solely upon the allegations of a petition for writ of habeas corpus by an inmate of a state prison

that the facts were other than as found by the state courts?

2. Where the state trial court offers a respondent a full and fair opportunity to secure an adjudication of all claimed deprivations of his constitutional rights in the securing of evidence offered against him at trial and he fails to fully utilize this procedure must a federal district court hold a plenary hearing to afford such respondent another opportunity to attack his final state court judgment in a collateral proceeding in federal habeas corpus?

STATEMENT OF THE CASE

Respondent, a state prisoner, filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, Northern Division, No. 8822. An order to show cause was issued, a return filed by petitioner herein including a copy of the state court record on appeal, and a traverse was filed by respondent. By order and memorandum opinion of the District Judge the petition was dismissed.

Respondent filed a notice of appeal and request for certificate of probable cause. The certificate of probable cause was granted by the District Judge and respondent permitted to proceed in forma pauperis. Counsel was appointed by the Court of Appeals, briefs filed and the matter orally argued. On October 18, 1965, the Circuit Court issued its order reversing and remanding the matter to the District Court for further

proceedings. A timely petition for rehearing was filed and rehearing in banc sought. This petition was denied by that court on November 24, 1965.

STATEMENT OF FACTS

History of Prior Proceedings

Respondent was charged in the state courts with seven counts of possession of a narcotic in violation of Section 11500 [2] of the Health and Safety Code of the State of California as well as two prior felony convictions. He was arraigned, pleaded not guilty and denied the priors. Respondent and his counsel waived jury trial on both the issues of guilt and the priors. After a court trial he was found guilty and the priors to be true. His motions for new trial and for probation were denied and he was sentenced for the terms prescribed by law, the sentences to run concurrently. A timely notice of appeal was filed. On the direct appeal, respondent was represented by counsel. After full consideration of the case the judgment was affirmed in *People* v. *Cunningham,* 188 Cal. App. 2d 606, 10 Cal. Rptr. 604. A petition for hearing was denied by the California Supreme Court (*People* v. *Cunningham,* 188 Cal. App. 2d 606, 611, 10 Cal. Rptr. 604) and certiorari denied by this Court after the filing of a requested response to said petition in *Cunningham* v. *California,* 368 U.S. 933, 7 L. Ed. 2d 195, 82 S. Ct. 370. This was subsequent to the

[2] See Appendix.

court's decision in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

Subsequently respondent sought to file a petition for habeas corpus with the United States District Court, Northern District of California, Northern Division, No. 8592. After a review by the court, this petition was denied and a certificate of probable cause denied. An application for a certificate of probable cause from the Court of Appeals for the Ninth Circuit was denied on June 20, 1963 in Misc. 1644. Respondent then filed a petition for habeas corpus with the California Supreme Court, Crim. 7540, which was denied without opinion by that court.

This petition for habeas corpus, the basis of the instant proceeding, was filed and the proceedings set forth, *supra,* had.

Facts as Disclosed by State Court Record

The state court record disclosed that on the afternoon of May 5, 1960, the police found three shoe boxes on a shelf in the closet of a room of a single story residence located at 841 West 75th Street, Los Angeles, California (RT 8).[3] Each of these boxes contained a large amount of the following kinds of narcotics: amidone, isonipecaine, codeine, morphine, opium, paversine, and dilaudid (RT 16). After these narcotics were found, respondent arrived at the house and was arrested by the police. He admitted the narcotics were

[3] RT refers to reporter's transcript in *People* v. *Cunningham,* 188 Cal.App.2d 606, 10 Cal Rptr. 604.

his and stated he had obtained them in a burglary of an East Los Angeles pharmacy the previous night (RT 18); that he had brought them to the house and put them in the closet during the early morning hours of that day (RT 19).

At the time respondent had numerous marks on his arm indicating to the trained narcotic officer that respondent was using narcotics. Respondent confirmed this suspicion and admitted that he used in excess of $100 worth of narcotics a day (RT 20).

The Facts Relative to the Alleged Search and Seizure

The police officers testified that at about 2 p.m. they had ascended the porch of the single story residence which was subsequently searched (RT 8). They observed a woman, Mrs. Schmidt, sitting in a chair in the front room facing them. When they knocked on the door she asked, "Who is it?" They informed her that they were police officers and were making a narcotic's investigation and desired to talk to her. She replied that she did not feel very well and they said they would appreciate talking to her for just a few minutes. She then got up from her chair and went to the front door. She unhooked the screen door and invited the police into the front room (RT 9, 24, 37, 39). As she opened the screen door, her dog ran out of the house (RT 10). She was asked with whom she was living and informed them that she was living with respondent (RT 10, 40, 58). Further interrogation revealed that she knew respondent was on parole and

knew of his past narcotic activity (RT 11, 40). She stated that she was sure he was no longer using narcotics (RT 40).

The police asked Mrs. Schmidt which room was respondent's and she pointed to the back room. It was at that time that the police asked her, "You don't mind if we look around?" She replied, "No, go right ahead" (RT 11, 40–41).

After the police had been engaged in conducting a search for about five minutes, Mrs. Schmidt stood up and walked to the door which separated the kitchen from the front room. At that time she asked, "Aren't you supposed to have a search warrant?" (RT 12). The police replied, "Normally, yes, but you recall you gave us permission to search" (RT 12). This response apparently satisfied her because she went back and sat down. At about this point in time, one of the officers walked up to the policeman who had been speaking to Mrs. Schmidt and gave him a vial which contained yellow capsules. The police believed that these capsules were barbital (Peo. Ex. 1; RT 12) and, in fact, they were (RT 16). Mrs. Schmidt was asked if she had a prescription for them and she stated that respondent had given them to her. At this time she was placed under arrest (RT 12, 45).

After Mrs. Schmidt's arrest, the search of the bedroom continued and shortly thereafter three shoe boxes were found on a shelf in the closet (RT 8). All of these boxes contained large quantities of narcotics (RT 12, 45).

Mrs. Schmidt, who was produced as a defense witness on the issue of consent, testified that the police informed her that they wanted to talk to her but did not mention narcotics (RT 49). She told the police that she did not feel well and did not feel like talking to anyone (RT 50). She denied that she opened the door or that it was opened by her dog (RT 50, 51). Rather, she maintained the police pulled the door ajar just enough to allow the dog to escape from the house (RT 50). The police then caught the dog and returned with it to the house (RT 51).

After the police had entered the living room, they asked her who lived there beside herself and she informed them that respondent lived there (RT 42). They asked her where the respondent's room was, and when she pointed to the rear bedroom they started toward it. According to her version, it was at that time she asked them, "Do you have a search warrant?" She testified that one of the officers replied, "We don't need one, we are already in" (RT 52). After this, Mrs. Schmidt sat down without saying or doing anything further to register disapproval of the search (RT 52).

She denied that she had asked the police to enter the apartment (RT 54). She denied that she had said at any time that she did not object to their looking around (RT 54). She thought by saying that she didn't want anyone there and asking the police for a search warrant that she was expressing her disapproval of any search of the premises (RT 59).

This conflict in the record was resolved against respondent herein by the state trial court. On direct appeal the District Court of Appeal considered the objection to the existence of consent and the question of implied coercion and held as follows (*People* v. *Cunningham,* 188 Cal. App. 2d 606, 609, 10 Cal. Rptr. 604):

> "The question as to whether officers have consent to enter and search premises is one of fact (*People* v. *Gorg,* 45 Cal. 2d 776, 782, 783 [291 P. 2d 469]; *People* v. *Neal,* 181 Cal. App. 2d 304 [5 Cal. Rptr. 241]) as is also the question as to whether that consent was voluntarily given or was in submission to an express or implied assertion of authority, and such question of fact is to be determined in the light of all the circumstances. (*People* v. *Burke,* 47 Cal. 2d 45, 49 [301 P. 2d 241]; *People* v. *Michael,* 45 Cal. 2d 751, 753 (290 P. 2d 852).) Of course, if there is substantial evidence to support the trial court's finding, it cannot be upset on appeal. In making these factual determinations it must be borne in mind that the trial judge passes on the credibility of the witnesses and determines the weight to which their testimony is entitled, and that in evaluating such testimony he is entitled to take into account the bias and prejudice of the witness, if any, and his interest in the outcome of the case.
>
> "It is implicit in the trial judge's ruling that he believed the testimony of the officer that Mrs. Schmidt, who lived there and who was in appar-

ent control and possession of the house, invited the officers in, and did not believe her contrary testimony, or that the officers gained admission through subterfuge by catching her dog when it ran out and bringing it back into the house to her. The case of *People* v. *Neal, supra,* is strikingly similar to the one at bar on the points here at issue. In the Neal case, according to the testimony of the police, the defendant opened the door of her apartment in response to the officers' ringing the door bell. When they showed her their police badges and said they would like to talk to her she replied, 'OK,' and stepped back and opened the door wider. In her testimony the defendant claimed she had asked the police several times whether they had a search warrant. On these facts it was held that the trial court was justified in drawing the inference that such action on the defendant's part was an invitation as well as consent to enter and that the entry had not been the product of trickery or subterfuge.

"What has been said with respect to the entry of the officers applies with equal force to the question of her consent that they could search the premises. She didn't mind. They could 'go right ahead.' Her later inquiry about a search warrant and her subsequent quiescent attitude did not, as a matter of law, require the trial court to draw an inference that she had withdrawn her consent to the search. A contrary inference was entirely reasonable, and it is apparent that the trial judge did draw such contrary inference. This was his prerogative."

The United States District Court in its opinion in the present case stated with relation to the question of consent:

"If consent is validly given, a search and seizure without a warrant is not unlawful (*Cutting* v. *United States,* 9 Cir., 169 F. 2d 951). Mrs. Schmidt could validly consent to the search of the house, and any evidence thus disclosed could be used against petitioner (*Stein* v. *United States,* 9 Cir., 166 F. 2d 851; and *United States* v. *Sferas,* 7 Cir., 210 F. 2d 69). The crucial question is whether Mrs. Schmidt freely and voluntarily consented to the search of her house, i.e. whether the consent voiced by her was given free from implied coercion (See: *Johnson* v. *United States,* 333 U.S. 10; and *Amos* v. *United States,* 255 U.S. 313). This Court cannot hold as a matter of law that the trial court, from the facts as recited above, could not have concluded that consent was freely and voluntarily given."

* * * * * * *

"A different situation is presented in the instant case. Here, rather than merely acquiescing to the officer's authority, Mrs. Schmidt invited them into the front room, and when asked if she minded if the officers looked around she affirmatively responded, 'No, go right ahead.' From these facts, the trial court could have concluded that Mrs. Schmidt freely and voluntarily consented to the search (Cf. *Teasley* v. *United States,* 9 Cir., 292 F. 2d 460; *Honig* v. *United States,* 8 Cir., 208 F.

2d 916; *United States* v. *MacLeod,* 7 Cir., 207 F. 2d 853; and *United States* v. *Waller,* N.D. Ill., 108 F. Supp. 450). The trial court was not compelled to conclude that, by her inquiry concerning the necessity of a search warrant, Mrs. Schmidt subsequently withdrew such consent. The officers' response apparently satisfied her, and she voiced no objection."

The Court of Appeals in its opinion held that the allegations of the respondent's petition for habeas corpus to the effect that Mrs. Schmidt did not verbally consent to the officers' entry into the house, their search of the bedroom, the allegation that she did not know of her right to refuse such consent and hence did not waive it as well as whether the respondent had the right to privacy and if so whether Mrs. Schmidt had authority to waive it, presented substantial federal questions which must be resolved by a factual hearing in a federal district court.

It is this holding of the court below which is sought to be reviewed.

REASONS FOR GRANTING CERTIORARI

I. The Decision of the Circuit Court is not in accord with Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745

In requiring a plenary hearing on the question of search and seizure in all of its aspects after a final state court judgment on the question, the court below

has misinterpreted this Court's decision in *Townsend* v. *Sain, supra,* and ignored the guidelines set forth in the case. There this Court stated (83 S. Ct. 745, 785):

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

In the present case, the state court did after a full hearing reliably find the relevant facts. The basic issue on the state trial was the question of the alleged illegal search and seizure. Respondent was represented by adequate and competent counsel who urged the question. He was in no manner restricted in the evidence he sought to introduce on the point. On such conflicting facts the trial court found against respondent which judgment was affirmed on appeal by the state courts and certiorari denied by this Court subsequent to *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. (See *People* v. *Cunningham,* 188 Cal. App. 2d 606, 10 Cal. Rptr. 604, cert. den. 368 U.S. 933, 7 L. Ed. 2d 195, 82 S. Ct. 370.)

Here the petition filed in the federal habeas corpus proceeding set forth no facts not known to respondent at the time of the state court proceedings. It obviously

was merely an attempt to relitigate a previously final state court judgment. In fact, as is apparent from the record, respondent's previous petition for habeas corpus raising the same question of an alleged illegal search and seizure was decided contrary to his contentions by both the federal district and circuit courts (USDC ND Calif. No. Civ. 8592; 9 Cir. No. Misc. 1644).

In *Linkletter* v. *Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601, this Court in holding the doctrine of *Mapp* v. *Ohio, supra,* not to be retroactive recognized the problems presented and the effect upon the administration of justice if hearings were to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If such evidence should be excluded the witnesses available at the time of the original trial would not be available or if located it is obvious their memory would be dimmed. This rationale, completely ignored by the court below in the present case, is directly applicable. Here the trial was in 1960. A full hearing was accorded to respondent on the contention of an alleged illegal search and seizure. On conflicting evidence it was resolved against him. To accord him at this late date a subsequent hearing on the same questions based solely on the allegations of his petition raising no points not known to him at the time of the original trial would indeed turn the proceeding into a mockery of justice to the People of the State of California.

We are not faced with a question of guilt or innocence. We do not have an alleged coerced confession present in this case as was the situation in *Fay* v. *Noia,* 372 U.S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822. We have a situation where the respondent was guilty of possession of a large quantity of narcotics which he had illegally secured.

Although *Mapp* v. *Ohio,* 367 U.S. 643, *supra,* was decided in 1961 there have been many hundreds of cases decided by California appellate courts on search and seizure questions. To permit the reopening on federal habeas corpus subject to plenary hearings of these cases decided by state courts on conflicting facts would obviously tax the administration of justice in federal district courts to the utmost.

This was not a case in which the federal district court denied the petition for habeas corpus without requiring the production of the state court record. The entire state court record was before the district court. The court below some five years after the state trial court proceedings seeks to ignore this record and rely solely upon the respondent's unsupported allegations contrary thereto as warranting a full hearing. The effect of such procedure is apparent. It will affect the administration of justice not alone in the State of California but in all states which had adopted the exclusionary rule prior to *Mapp* v. *Ohio,* 367 U.S. 643, *supra.* It is thus requested that certiorari be granted.

II. Where a State Trial Court Affords a Respondent a Full and Fair Opportunity to Secure an Adjudication of All Claimed Deprivations of His Constitutional Rights and He Fails to Fully Utilize This Procedure Is He Entitled to a Plenary Hearing in a Federal District Court on These Same Points?

As was recognized in the opinion of the court below the only issue at trial was the admissibility of the seized evidence. Respondent who had counsel produced all evidence he sought to adduce on this point in the state trial court. The state court on conflicting evidence found that Rene Schmidt did voluntarily consent to the search. No reason for a reexamination of this finding by the federal courts is present. When the trial judge found that Rene Schmidt voluntarily consented to the search he necessarily found that she had authority to give such consent.

No question was raised by respondent herein in the state trial court that Mrs. Schmidt did not have such authority. Neither he nor his witness Rene Schmidt testified as to the details of their relationship or about the arrangements under which they occupied the residence which was searched. Respondent did not testify nor did he seek to adduce from Rene Schmidt any details as to their relationship which would have precluded her apparent authority and control over the premises and upon which the officers relied for consent. Respondent in the federal habeas corpus proceeding set forth no new facts which would have

warranted a contrary conclusion. Even if he had, it would appear that such procedure should not be permitted in a collateral attack on a final state court judgment in the absence of some showing of extraordinary circumstances precluding the raising of this question at the state trial level. (Cf. *Nelson* v. *California,* 346 F. 2d 73.)

Regardless of whether respondent wished to personally testify he had full opportunity to develop the relationship and the living arrangements between himself and Rene Schmidt in the state trial court proceedings. This he did not do. He certainly should not some five years later be permitted to have a full hearing in order to develop all facts which previously were within his and his witness's knowledge by a collateral attack on this hitherto final state court judgment.

Under the factual situation developed by the record in the case at bar there is no impediment to invoking the rule that a search is not unreasonable if made with the consent of the co-occupant of the premises who, by virtue of her relationship or other factors, the officers reasonably and in good faith believed has authority to consent to their entry. (*People* v. *Gorg,* 45 Cal. 2d 776, 291 P. 2d 469; *People* v. *Guyette,* 231 Cal. App. 2d 460, 41 Cal. Rptr. 875; *People* v. *Kinard,* 210 Cal. App. 2d 85, 26 Cal. Rptr. 377; *People* v. *Ortiz,* 210 Cal. App. 2d 489, 26 Cal. Rptr. 677; *People* v. *Rogers,* 207 Cal. App. 2d 261, 24 Cal. Rptr. 341.)

In a very recent case decided by the California Supreme Court on January 4, 1966, *People* v. *Smith,*

et al., Crim. 8547, 63 A.C.___, the court recognized that a valid consent to search may be given by a defendant's mistress. To the same effect see *People* v. *Nelson,* 218 Cal. App. 2d 359, 362–363, 32 Cal. Rptr. 675; *People* v. *Smith,* 183 Cal. App. 2d 670, 6 Cal. Rptr. 866.

This Court has not taken the position that consent to enter and search may only be given by the person against whom the evidence is sought to be admitted. On the contrary, it has recognized that one who has control over the premises searched may consent to the search (*Abel* v. *United States,* 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668). To the same effect see *Teasley* v. *United States,* 9 Cir. 292 F. 2d 460; *United States v. Eldridge,* 4 Cir. 302 F. 2d 463 and cases cited; *Roberts* v. *United States,* 8 Cir. 332 F. 2d 892; *Maxwell* v. *Stephens,* 8 Cir. 348 F. 2d 325; *Burge* v. *United States,* 9 Cir. 342 F. 2d 408; *Rees* v. *Peyton,* 4 Cir. 341 F. 2d 859; *Drummond* v. *United States,* 8 Cir. 350 F. 2d 983.

In the recent case of *In re Sterling,* 63 A.C. 509, 512, ___ Cal. Rptr. ___, the California Supreme Court reiterated its position that habeas corpus will not normally lie in the state courts to review a question of alleged illegal search and seizure. After setting forth the rights protected by our state courts through trial and appellate review, the court stated:

> "Failure to exercise these readily available remedies will ordinarily constitute such a deliberate bypassing of orderly state procedures as to justify

denial of federal as well as state collateral relief. (*Fay* v. *Noia* (1963) 372 U.S. 391, 438–439.) Pursuit of these remedies will give a defendant a full adjudication of his claim and also lay the groundwork for immediate federal review. Under these circumstances, to authorize additional state collateral remedies would result only in needless repetition and delay. We have recognized the need to accommodate the state system to the existence of a federal collateral remedy (*In re Shipp, supra,* 62 Cal. 2d at 554–555), but such accommodation does not require the abandonment of procedures vital to the orderly administration of justice by the state courts. Preservation of a defendant's constitutional rights lies not in multiple state remedies that will ordinarily produce the same result, but in one effective state remedy plus an awareness on the part of all state officials that ultimate federal review is available. We expedite the availability of that federal remedy by the compilation of a full and adequate record and by insisting that one state remedy is ordinarily enough."

The decision of the court below would minimize the finding of the California courts as to the protections sought to be afforded by state procedural safeguards and recognition of constitutional rights and standards. The decision opens the flood gates to relitigation of final state court judgments by petitioners who are required to make no showing of why the matters now sought to be urged were not previously urged when they had full opportunity to so do in state courts. It requires full scale hearings years after the occur-

rences in matters which do not involve a question of guilt or innocence of the respective defendants. The rationale of the opinion is at variance with that of this Court in *Linkletter* v. *Walker,* 381 U.S. 618, *supra.*

CONCLUSION

For the reasons previously discussed, we respectfully submit that certiorari should issue to review the decision of the court below.

Dated: Sacramento, California

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM CUNNINGHAM,
Appellant,

vs.

ROBERT A. HEINZE, Warden, California State Penitentiary,
Appellee.

No. 19,344

[October 18, 1965]

Appeal from the United States District Court for the Northern District of California Northern Division

Before: POPE and BROWNING, Circuit Judges, and THOMPSON, District Judge

BROWNING, Circuit Judge:

Appellant was convicted of possessing narcotics in violation of state law. He filed a petition for habeas corpus in the United States District Court for the Northern District of California, alleging that his conviction was based upon evidence seized in violation of the Fourteenth Amendment. The district court dismissed the petition without an evidentiary hearing.

I

Appellant's timely petition to the United States Supreme Court for a writ of certiorari to the California Supreme Court to review the judgment of conviction was denied after the decision in *Mapp v. Ohio,* 367 U.S. 643 (1961), overruling *Wolf v. Colorado,* 338 U.S. 25 (1949). *Cunningham v. California,* 368 U.S. 933 (1961). The rule of *Mapp,* excluding illegally seized evidence from state court trials, applies to cases in which the state court judgment was not final when *Mapp* was announced because the state could not justifiably have acted in reliance upon such a judgment. The rule of *Mapp* therefore applies to appellant's case. *Linkletter v. Walker,* 381 U.S. 618, 622 n.5 (1965).

We cannot accept appellee's suggestion that significance should be attached to the fact that the Supreme Court denied appellant's petition for certiorari *(Cunningham v. California,* 368 U.S. 933 (1961)) while granting review and reversing in other cases (*Ker v. California,* 368 U.S. 974 (1962), 374 U.S. 23 (1963); *Fahy v. Connecticut,* 372 U.S. 928 (1963), 375 U.S. 85 (1963); *Stoner v. California,* 374 U.S. 826 (1963), 376 U.S. 483 (1964)) in which violation of the *Mapp* rule was urged. See *Brown v. Allen,* 344 U.S. 443, 489–97 (1953).

II

The state introduced in evidence at appellant's trial three shoe boxes containing narcotics found by officers on a shelf in a bedroom closet in a private home. One of the officers testified that a Mrs. Schmidt, who was in the front room of the house when the officers ar-

rived, invited them to enter and consented to the search.

Appellant presents two basic contentions: First, that Mrs. Schmidt did not verbally consent to the search, and, if she did, her consent did not meet federal standards for determining whether waiver of a constitutional right has occurred; and, second, that the bedroom closet was part of appellant's personal living quarters and contained his personal effects, and Mrs. Schmidt had no authority to waive his constitutional right to privacy.

1. *Consent and waiver.* Appellant alleges that Mrs. Schmidt did not verbally consent either to the officers' entry into the house or their search of the bedroom closet. Appellant also alleges that Mrs. Schmidt did not know she could refuse to permit a search without a warrant, and that if she had known of her right she would not willingly have waived it. Appellant offers Mrs. Schmidt's affidavit supporting these allegations. Appellant also alleges that Mrs. Schmidt, a crippled woman, was alone in the house; that three men, strangers to her, came to her door, identified themselves as police officers, and announced they were making a narcotics investigation; that the men opened the unlatched screen door and entered the house without consent; that they questioned her about appellant's involvement with narcotics, and asked to be directed to his room; and that she inquired if they had a search warrant, and was told they didn't need one because they were already in the house.

These allegations raise a substantial question as to whether Mrs. Schmidt verbally consented to the entry

and search, and whether verbal consent if given constituted an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). See *Cipres v. United States,* 343 F.2d 95, 97–98 (9th Cir. 1965), and cases cited. The district court is therefore required to hold an evidentiary hearing "unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain,* 372 U.S. 293, 313 (1963).

The state trial court did not expressly find either that Mrs. Schmidt verbally consented to the search, or that the circumstances surrounding the asserted consent were not as appellant alleges. Nor did the state court impliedly make such findings. The state's attorney supported the lawfulness of the search on a number of grounds, including the theory that the search was incident to an arrest supported by probable cause. The state court gave no reasons for its ruling admitting the evidence. Therefore, the possibility cannot be excluded that the state court found appellant's factual allegations to be true (or did not reach the factual issues), but concluded that the search was nonetheless valid on this alternate ground. *Townsend v. Sain, supra,* 372 U.S. at 313–14, 320.

Moreover, the state's attorney argued to the state trial court that appellant's reliance upon *Amos v. United States,* 255 U.S. 313 (1921), and *Johnson v. United States,* 333 U.S. 10 (1948), was misplaced because "federal cases are not controlling on the question of admissibility of evidence on search and seizure in California." The state trial court's failure to articulate the basis for its decision makes it impossible to determine whether it adopted this erroneous view of the law. "Since the decision of the state trier of fact

may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts." *Townsend v. Sain, supra,* 372 U.S. at 314.[1]

2. *Authority to waive.* An evidentiary hearing must also be held to determine whether appellant had a right to privacy, and, if so, whether Mrs. Schmidt had authority to waive it. There is no contention that the state court took evidence or made findings on these questions.[2]

Appellant alleges that the rear bedroom and closet were his private living quarters, containing his private effects—that Mrs. Schmidt occupied her own bedroom in another part of the house. He alleges that the search was directed against him and his quarters and effects, and not against Mrs. Schmidt—that the officers went to the house to investigate appellant and asked to be directed to "his bedroom." Appellant alleges that he did not authorize Mrs. Schmidt, or anyone else, to search his personal quarters or his personal effects.

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[1] The state intermediate appellate court assumed the state trial judge decided the question of consent and waiver, and thought it "implicit" that the judge credited the officers and disbelieved Mrs. Schmidt. People v. Cunningham, 188 Cal.App.2d 606, 609–10 (1961). For the reasons we have stated, we cannot agree.

The appellate court seems to have treated *Amos* and *Johnson, supra,* as distinguishable rather than not binding, although this is not entirely clear. 188 Cal.App.2d at 610. In any event, we are concerned with the fact-finding process of the trial judge, not with the reasoning of the appellate tribunal.

[2] The dissent suggests appellant may have waived the issue of Mrs. Schmidt's lack of authority. The state has not made this contention heretofore. If on remand the state now chooses to do so, it must bear the burden of proving that appellant intentionally abandoned a known right. No narrower formulation of the controlling standard is permissible. Fay v. Noia, 372 U.S. 391, 439 (1963).

These allegations raise a substantial issue. Living quarters and effects no more private than these allegedly were have been protected from unreasonable search and seizure. *McDonald v. United States,* 335 U.S. 451 (1948); *Reeves v. Warden,* 346 F.2d 915, 924–25 (4th Cir. 1965); *Holzhey v. United States,* 223 F.2d 823 (5th Cir. 1955); *United States v. Blok,* 188 F.2d 1019 (D. C. Cir. 1951).

The state contends that effective consent to search may be given by one who shares control of the premises. But appellant alleges that the bedroom closet and effects it contained were his, and that he had not voluntarily shared their control with Mrs. Schmidt.[3]

The state argues that a search is reasonable if permission is granted by one who "the officers reasonably and in good faith believe had authority to consent to thei: entry." But we have held that "the crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." *Cipres v. United States,* 343 F.2d 95, 98 (9th Cir. 1965). Mrs. Schmidt's mere presence in the house was not enough to establish as a matter of law that she had authority to waive appellant's right to the privacy of his quarters and effects. Decisions of the Supreme Court "make clear that the rights protected by the Fourth Amendment are not to be eroded by strained application of the law of agency or by unrealistic doctrines of 'apparent authority.'" *Stoner v. California,* 376 U.S. 483, 488 (1964).

Even if Mrs. Schmidt had express or implied authority to enter appellant's bedroom for cleaning and

[3] The bathroom searched in Burge v. United States, 342 F.2d 408 (9th Cir. 1965), was shared. *Cf.* Nelson v. California, 346 F.2d 73, 77 (9th Cir. 1965).

similar purposes, it would not follow that she could permit a police search of appellant's room, closet, and effects. *Stoner v. California, supra,* 376 U.S. at 489–90; *Chapman v. United States,* 365 U.S. 610, 616 (1961); *United States v. Jeffers,* 342 U.S. 48, 51–52 (1951); *Reeves v. Warden, supra,* 346 F.2d at 924–25 (4th Cir. 1965); *Holzhey v. United States, supra,* 223 F.2d at 826; *United States v. Blok, supra,* 188 F.2d at 1021.

Reversed and remanded for further proceedings.

THOMPSON, District Judge (Concurring in part, and dissenting in part):

The issue presented is whether the procedures had in this case require an evidentiary hearing and a redetermination of the issue of unlawful search and seizure.

The initial trial was conducted before the Superior Court of the State of California, sitting without a jury and resulted in defendant's conviction on August 1, 1960 for the unlawful possession of narcotics. The only issue at the trial was the admissibility of the seized evidence. The attention of both parties and the trial judge was concentrated on that sole issue. Both parties had full opportunity to offer all evidence relevant to the issue. Only two witnesses testified, M. E. Buckner, one of the police officers who conducted the search, and Rene Schmidt, the occupant of the searched house, who consented to the search. The defendant did not testify. The transcript discloses that Gerald Levie, Esq., defendant's attorney, was well prepared and forceful in his presentation of the defense that the narcotics had been unlawfully seized

and were inadmissible as evidence. The conviction was affirmed on appeal. People v. Cunningham, 188 Cal. App. 2d 606, 10 Cal. Rptr. 604. A petition for hearing was denied by the California Supreme Court. Certiorari was denied by the United States Supreme Court. Cunningham v. California, 1961, 368 U.S. 933.

The case has since been twice before the United States District Court for the Northern District of California and once before the Supreme Court of California on petitions for habeas corpus, questioning the legality of the search. In each instance, the petitions were denied. This is on appeal from the second Federal District Court petition.

In Townsend v. Sain (1963), the Supreme Court has established the guidelines for determination of when an evidentiary hearing is required or justified. The basic standard is:

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

The evidentiary facts supporting the validity of the search as adduced at the state court trial have been accurately summarized by the federal district judge in his memorandum opinion, as follows:

> "Officer Buckner testified as follows: On May 5, 1960, at approximately 2:00 p.m., he and two other policemen ascended the porch of the house that was subsequently searched. Officer Buckner observed a

woman, Mrs. Rene Schmidt, sitting in a chair in the front room facing them. He knocked on the door, and she asked, 'Who is it?'. He replied that he was a police officer making a narcotic investigation and wanted to talk to her. She responded that she did not feel very well. Officer Buckner told her that he would appreciate talking to her for a few minutes, and she got up, came to the door, unhooked it, and invited the officers into the front room. As Mrs. Schmidt opened the screen door her dog ran out of the house. One of the officers caught the dog and brought it back into the house. After letting the police in, Mrs. Schmidt again sat down. When Officer Buckner asked her with whom she lived, she replied that she was living with petitioner. She stated that she knew he was on parole and knew of his past narcotic activity but explained that she was sure that he was no longer using narcotics. When asked which room was petitioner's, Mrs. Schmidt indicated the back bedroom. Officer Buckner then asked, 'You don't mind if we look around?' or 'Do you mind if we look at it?' and she answered, 'No' or 'No, go right ahead.' About five minutes later, Mrs. Schmidt got up and walked to the door separating the kitchen from the front room and asked, 'Aren't you supposed to have a search warrant?' Officer Buckner replied, 'Normally, yes, but you recall you gave us permission to search.' She then went back and sat down and did not say anything further. One of the officers then approached Officer Buckner with a vial containing yellow capsules appearing to be barbitol. When asked if she had a prescription for the pills, Mrs. Schmidt replied that petitioner had given them to her. At that point

she was placed under arrest. Shortly thereafter (about three minutes), Officer Buckner was called to the bedroom and observed three shoe boxes containing large amounts of narcotics sitting on a shelf in the closet."

The first issue, "Consent and Waiver", discussed in the majority opinion has, in my opinion, been settled. It is an established fact, found from conflicting evidence, that Rene Schmidt did voluntarily consent to the search. This finding should not be reexamined. The prior state court hearing occurred in the course of the original trial (it was in fact the only issue tried), and it is proper to assume "that the claim was rejected on the merits." (Townsend v. Sain, p. 314).

A fair reading of the trial record discloses that the state made no genuine effort to support the search as being based on probable cause. The evidence on that issue was cursory and patently deficient. The district attorney did not argue probable cause at the conclusion of the reception of evidence.[1] The defendant

[1] Opening his argument to the trial judge, the defense attorney, Mr. Levie, said:

"The first point is pretty obvious. In fact, the District Attorney has practically stipulated that this case is a consent case and not one of probable cause.

"They are not trying to establish probable cause, but they are saying they entered the place because of the consent—what they are relying on is, they had the consent of the occupants, and I think I am not misstating their position in any way.

"I think this is being tried as a consent case, whether or not the occupant consented."

Paul John Geragos, Deputy District Attorney, did not dispute this statement or argue that the search was incident to an arrest supported by probable cause.

objected to the reception of the narcotics as evidence and the Court overruled the objection and admitted the evidence. It is necessarily implied, on this record, that the Court found that the search and seizure were legal because Rene Schmidt had voluntarily consented to the search.

It is also, in my opinion, inaccurate to suggest that the state trial court may have adopted an erroneous view of the law, that is, that "federal cases are not controlling on the question of admissibility of evidence on search and seizure in California." The Townsend case states (p. 314): "Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts." In this case, when the defense attorney argued the theory of implied coercion, citing Amos v. United States (1921), 255 U.S. 313, and Johnson v. United States (1948), 333 U.S. 10, and the Deputy District Attorney argued that federal cases were inapplicable, the trial judge said: "Well, it seems to me that we are getting around to the federal rulings on search and seizure." I cannot infer from this a purpose to disregard federal law.

The second point of the majority opinion is "Authority to Waive". When the trial judge found, as is necessarily implied in this record, that Rene Schmidt freely consented to the search and admitted the seized narcotics into evidence, he also necessarily found that Rene Schmidt had authority to give consent. This was an experienced trial judge, a former professor of con-

stitutional law. It is unrealistic to suggest that he admitted the crucial evidence after a trial devoted to testimony on the issue of consent without considering and finding that the person who gave consent had authority over the premises searched.

The fact is that defendant impliedly conceded Schmidt's authority. The question was never raised. Neither Rene Schmidt nor defendant testified about the details of the relationship between them or about the arrangements under which they occupied the residence which was searched. We don't know whether they were owners, lessees, renters or trespassers. We do know that defendant Cunningham lived with Rene Schmidt and that the back bedroom was identified as his. In my opinion, Rene Schmidt's occupancy of the premises at the time of the search invested her with apparent authority and control over them upon which the officers were entitled to rely prima facie. If subsequent evidence should prove their reliance misplaced, the fruits of the search would be inadmissible. They took that chance.

By the same token, the trial judge, conducting a plenary trial of the validity of the search and offering full opportunity to both parties to present any evidence relevant to the question, was entitled to rely on Schmidt's apparent authority to consent to the search when that authority was not impugned either by evidence or in argument. It should be emphasized that the defendant did not testify. This was a court trial. He was represented by competent counsel who ably presented his contest of the validity of the search. The only fair inference is that his testimony, if given, would not have aided him.

This situation also presents an interesting question of which of two constitutional privileges the Court was supposed to protect. Defendant, at the trial, chose to invoke his privilege under the Fifth Amendment not to testify, thus deliberately curtailing the scope of the proof in support of his Fourth Amendment privilege. Having lost, he now says, "I should have testified and I want now to testify that these were my 'private' living quarters."[2]

Even at this late date, defendant, in his affidavits collaterally attacking the state court finding, does not see fit to enlighten the Court as to the facts. The only new fact stated by the defendant in his affidavit is: "That the rear bedroom of the said private dwelling house was the private living quarters of affiant herein." This, under these circumstances, is a conclusory statement and amounts to playing a game with the Courts. He makes no effort to states facts from which the Court might draw its own conclusion as to whether or not he had any private living quarters protected by the Fourth Amendment.

Obviously, the material facts (re authority to waive) were not fully developed at the state court hearing. The equally obvious reason is that defendant elected not to present this issue. "If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, post, p. 438 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in Fay v. Noia adequately

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[2] In her post-conviction affidavit, Rene Schmidt does not aver that the back bedroom was Cunningham's private domain, or any facts from which this might be inferred. Her affidavit, in substance, adds nothing to her trial testimony.

protects the legitimate state interest in orderly criminal procedure, *for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberately by-passing of state procedures.*" Townsend v. Sain, p. 317.

The controlling standard respecting inexcusable default was articulated in Fay v. Noia, (1962), 372 U.S. 391, at 438–439:

> "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
>
> "But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf.

> Price v. Johnston, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. Carnley v. Cochran, 369 U.S. 506, 513-517; Moore v. Michigan, 355 U.S. 155, 162-165. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.g., Rice v. Olson, 324 U.S. 786."

It is not clear from this record whether or not Cunningham, after consultation with counsel, deliberately elected not to testify at the state court trial. Cf. Nelson v. California (9 CCA 1965), 346 F. 2d 73. The issue of deliberate by-passing, like the requirement of exhaustion of state court remedies (Ex Parte Hawke, 1944, 321 U.S. 114), from which it stems (Fay v. Noia, supra), inheres in every federal habeas corpus application attacking a state conviction. It does not depend on someone asserting the point or defense. If Cunningham consciously invoked his Fifth Amendment privilege not to testify at the trial, he should not now be permitted to recant for the purpose of aiding his claim under the Fourth Amendment.

I think the evidentiary hearing required by the majority should be limited to two issues:

1. Did Cunningham understandingly and deliberately, for whatever reason, elect not to testify at the state trial?

2. Was the character of Rene Schmidt's possession and control of the searched premises such as to vest in her the power to consent to the search?

If either question is answered in the affirmative, the conviction should be sustained.

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM CUNNINGHAM,
Appellant,

vs.

ROBERT A. HEINZE, Warden, Calif. State Penitentiary,
Appellee

No. 19,344

APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division,

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and that this cause be, and hereby is remanded to said District Court for further proceedings.

Filed and entered October 18, 1961

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

WILLIAM CUNNINGHAM, Petitioner, v. ROBERT A. HEINZE, Warden, California State Prison, Represa, California, Respondent.	Civil No. 8822

MEMORANDUM AND ORDER

Petitioner has filed with this Court a petition for a writ of habeas corpus, challenging his custody by the Warden of the California State Prison at Folsom. An order to show cause was issued in this proceeding requiring respondent to show cause why a writ of habeas corpus should not be issued as prayed for, and respondent has filed a return accompanied by a motion to dismiss the petition. To this return and motion petitioner has filed his traverse and answer.

The gravamen of petitioner's petition is that certain evidence used at his trial was the product of an unreasonable search and seizure in violation of the

Fourth and Fourteenth Amendments to the United States Constitution. Petitioner previously brought a habeas corpus proceeding in this Court (See: *Cunningham v. Heinze,* Civil No. 8592, files of this Court) in which he contended that his version of the circumstances surrounding the assailed search, rather than that offered at the trial by Officer Buckner, was correct, and that there was therefore no consent to the search. This Court, in a memorandum and order dated January 28, 1963, dismissed petitioner's petition. Petitioner's application for a certificate of probable cause for appeal was denied by this Court on March 8, 1963, and by the United States Court of Appeals for the Ninth Circuit on June 27, 1963 (Misc. No. 1644. This Court has again reviewed the record, and after a careful consideration of the transcript of petitioner's trial the Court is satisfied that petitioner was afforded a full and fair hearing at his trial on the disputed facts. The trial court was free to believe the officer's testimony as opposed to that of Mrs. Rene Schmidt, with whom petitioner had been living. Accordingly, this Court need not hold a hearing to redetermine the truth or falsity of petitioner's factual contentions (*Townsend v. Sain,* 372 U.S. 293, 313).

In the present petition, petitioner takes the position that, even if the conflict in testimony were resolved against him, as a matter of law consent to the search was not established.

Officer Buckner testified as follows: On May 5, 1960, at approximately 2:00 p.m., he and two other policemen ascended the porch of the house that was subsequently searched. Officer Buckner observed a woman, Mrs. Rene Schmidt, sitting in a chair in the front

room facing them. He knocked on the door, and she asked, "Who is it?". He replied that he was a police officer making a narcotic investigation and wanted to talk to her. She responded that she did not feel very well. Officer Buckner told her that he would appreciate talking to her for a few minutes, and she got up, came to the door, unhooked it, and invited the officers into the front room. As Mrs. Schmidt opened the screen door her dog ran out of the house. One of the officers caught the dog and brought it back into the house. After letting the police in, Mrs. Schmidt again sat down. When Officer Buckner asked her with whom she lived, she replied that she was living with petitioner. She stated that she knew he was on parole and knew of his past narcotic activity but explained that she was sure that he was no longer using narcotics. When asked which room was petitioner's, Mrs. Schmidt indicated the back bedroom. Officer Buckner then asked, "You don't mind if we look around?" or "Do you mind if we look at it?" and she answered, "No" or "No, go right ahead." About five minutes later, Mrs. Schmidt got up and walked to the door separating the kitchen from the front room and asked, "Aren't you supposed to have a search warrant?" Officer Buckner replied, "Normally, yes, but you recall you gave us permission to search." She then went back and sat down and did not say anything further. One of the officers then approached Officer Buckner with a vial containing yellow capsules appearing to be barbitol. When asked if she had a prescription for the pills, Mrs. Schmidt replied that petitioner had given them to her. At that point she was placed under arrest. Shortly thereafter (about three minutes), Officer Buckner was called to the bedroom and ob-

served three shoe boxes containing large amounts of narcotics sitting on a shelf in the closet.

If consent is validly given, a search and seizure without a warrant is not unlawful (*Cutting* v. *United States,* 9 Cir., 169 F.2d 951). Mrs. Schmidt could validly consent to the search of the house, and any evidence thus disclosed could be used against petitioner (*Stein* v. *United States,* 9 Cir., 166 F.2d 851; and *United States* v. *Sferas,* 7 Cir., 210 F.2d 69). The crucial question is whether Mrs. Schmidt freely and voluntarily consented to the search of her house, i.e. whether the consent voiced by her was given free from implied coercion (See: *Johnson* v. *United States,* 333 U.S. 10; and *Amos* v. *United States,* 255 U.S. 313). This Court cannot hold as a matter of law that the trial court, from the facts as recited above, could not have concluded that consent was freely and voluntarily given.

In *Johnson* v. *United States, supra,* the officer testified that after he knocked on the door and identified himself there was a slight delay and some "shuffling or noise" in the room. The defendant then opened the door. The officer said, "I want to talk to you a little bit," and she then "stepped back acquiescently and admitted us." The Court held that the entry was demanded under color of office and granted in submission to authority, rather than freely and voluntarily. In *Amos* v. *United States, supra,* collectors of internal revenue testified that when they told a woman who said she was the defendant's wife that they were revenue officers and had come to search the premises "for violations of the revenue law," the woman admitted them. The Court held that the admission was made under "implied coercion."

A different situation is presented in the instant case. Here, rather than merely acquiescing to the officer's authority, Mrs. Schmidt invited them into the front room, and when asked if she minded if the officers looked around she affirmatively responded, "No, go right ahead." From these facts, the trial court could have concluded that Mrs. Schmidt freely and voluntarily consented to the search (Cf. *Teasley* v. *United States,* 9 Cir., 292 F.2d 460; *Honig* v. *United States,* 8 Cir., 208 F.2d 916; *United States* v. *MacLeod,* 7 Cir., 207 F.2d 853; and *United States* v. *Waller,* N.D. Ill., 108 F.Supp. 450). The trial court was not compelled to conclude that, by her inquiry concerning the necessity of a search warrant, Mrs. Schmidt subsequently withdrew such consent. The officer's response apparently satisfied her, and she voiced no objection.

This Court is aware of authority for the proposition that, in the absence of some extraordinary circumstance such as ignorance of the presence of the contraband, whenever police officers identify themselves as such, search a room, and find contraband, the occupant's words or signs of acquiescence in the search, accompanied by denial of his guilt, may not show consent.[1] That view, however, appears in the main to be limited to the District of Columbia. Other courts have held that the voluntariness of consent to a search is to be determined upon the facts of each case (*United States* v. *De Vivo,* E.D.N.Y., 190 F.Supp. 483) and that under circumstances similar to those

[1] *Higgins* v. *United States,* D.C., 209 F.2d 819; see also *United States* v. *Evans,* D.D.C., 194 F.Supp. 90; *United States* v. *Roberts,* D.D.C., 179 F.Supp. 478; and *United States* v. *Busby,* D.D.C., 126 F.Supp. 845; and cf. *Catalanotte* v. *United States,* 6 Cir., 208 F.2d 264.

presented here a valid consent may be found (See *Teasley* v. *United States, supra; Honig* v. *United States, supra;* and *United States* v. *MacLeod, supra*).

Petitioner has thus presented no facts in his petition upon which this Court could afford him any relief. Accordingly, respondent's motion to dismiss the petition must be granted.

IT IS, THEREFORE, ORDERED that petitioner's petition for a writ of habeas corpus be, and the same is, hereby dismissed.

DATED: April 9, 1964.

SHERRILL HALBERT
UNITED STATES DISTRICT JUDGE

APPENDIX C

CALIFORNIA HEALTH AND SAFETY CODE

Section 11500: Except as otherwise provided in this division, every person who possesses any narcotic other than marijuana except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State, shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.

If such a person has been previously convicted of any offense described in this division or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years.

UNITED STATES CONSTITUTION

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION

Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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